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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OFELIA RODRIGUEZ DE QUIJAS, *et al.*,

Petitioners,

—v.—

SHEARSON/AMERICAN EXPRESS, INC.,
its successors and assigns,

Respondents.

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI*

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SECURITIES INDUSTRY ASSOCIATION

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI*

PRELIMINARY STATEMENT

The Securities Industry Association ("SIA") submits this brief as *amicus curiae* in support of the Petitioner, and urges this Court to issue a writ of *certiorari* to the United States Court of Appeals for the Fifth Circuit with respect to its opinion and judgment below in *Rodriguez De Quijas* v. *Shearson/Lehman Brothers*, 845 F.2d 1296 (5th Cir. 1988). The consents of petitioner Ofelia Rodriguez De Quijas and of respondent Shearson/American Express, Inc., have been obtained and the originals thereof have been filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

SIA is the principal trade association of the securities industry, having as members more than five hundred and fifty securities firms in the United States and Canada. As such, it has a substantial interest in the extent to which agreements to arbitrate claims between securities firms and their customers may be enforced. Because arbitration is an efficient, fair, and economical manner of resolving disputes, most of SIA's members have agreed with many of their customers to arbitrate any controversies arising between them.

Certain of SIA's members are parties to cases pending in the lower federal courts that involve the issue presented on this petition. The procedural outcome of those actions will be affected by any decision taken by this Court on this petition. *Amicus curiae* therefore has a substantial interest in seeing this Court resolve whether agreements to arbitrate claims arising under Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2) (the "Securities Act"), are enforceable as valid contracts under Section 2 of the United States Arbitration Act, 9 U.S.C. § 2 (the "Arbitration Act"), as is the case with claims arising under the Securities Exchange Act of 1934, 15 U.S.C. § 78 (the "Exchange Act"). *Amicus* seeks to clarify and make uniform the law on this issue so that the enforceability of arbitration provisions in agreements with their customers can be predicted and relied upon. SIA has also filed briefs *amicus curiae* on the enforceability of agreements to arbitrate Exchange Act claims to this Court in *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213 (1985), and in *Shearson/American Express, Inc.* v. *McMahon*, ____ U.S. ____, 107 S.Ct. 2332 (1987), and has moved for leave to file a brief with respect to a petition raising the identical issue at bar here in *Dain Bosworth Incorporated* v. *Johnson*, No. 88-284.

REASONS FOR GRANTING A WRIT OF *CERTIORARI*

The issue this petition lays before the Court is whether predispute agreements to arbitrate claims arising under Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2) (the "Securities Act"), are enforceable. Last year, in *Shearson/American Express, Inc.* v. *McMahon*, ____ U.S. ____, 107 S.Ct. 2332 (1987), the Court held that agreements to arbitrate claims under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (the "Exchange Act"), were enforceable under the United States Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (the "Arbitration Act"). *McMahon* rejected an argument based on *Wilko* v. *Swan*, 346 U.S. 427 (1953), that an agreement to arbitrate federal securities claims waives substantive rights bestowed by the federal securities laws and is therefore void under the nonwaiver provisions of those laws. In restricting *Wilko* to its peculiar facts, *McMahon* rejected both *Wilko's* general hostility to the arbitration process and its specific reasoning. *Amicus* now respectfully asks the Court to make the law in this area uniform by overruling *Wilko*.

SUMMARY OF ARGUMENT

The opinion of the United States Court of Appeals for the Fifth Circuit below, *Rodriguez De Quijas* v. *Shearson/Lehman Brothers*, 845 F.2d 1296 (5th Cir. 1988), held that predispute agreements to arbitrate Section 12(2) claims are enforceable as valid contracts under the Arbitration Act. It did so based on this Court's opinion in *Shearson/American Express* v. *McMahon* that such an agreement is not a waiver of compliance with the Exchange Act. Because *McMahon* totally rejected the analytical predicate of the decision in *Wilko*—that an agreement to arbitrate waives substantive rights—the Fifth Circuit interpreted *McMahon* as having effectively overruled *Wilko* and therefore did not feel constrained to follow *Wilko*.

The Fifth Circuit correctly recognized *Wilko*'s "obsolescence" in light of the *McMahon* decision. *Wilko* reflects the

suspicion courts once held of the arbitral process, as opposed to the congressionally enacted federal policy recognizing arbitration as an efficient means of resolving disputes. *See Shearson/American Express, Inc.* v. *McMahon*, 107 S.Ct. at 2340; *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984); *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983). *Wilko* did not apply the correct standard for determining whether Section 12(2) repealed the Arbitration Act by implication, which standard has been stated by this Court in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982), and *Morton* v. *Mancari*, 417 U.S. 535 (1974). Rather than searching for statutory language conflicting with the Arbitration Act or legislative history indicating congressional intent to repeal the Arbitration Act, *Wilko* overruled the substantive, congressional policies embodied in the Arbitration Act solely on the basis of its own conception of public policy.

A writ of *certiorari* is appropriate here because there exists a split in the Circuits. In contrast to the result here, the Second Circuit has held in *dictum* that *Wilko* remains good law because this Court did not explicitly overrule it in *McMahon*. *Chang* v. *Lin*, 824 F.2d 219, 222 (2d Cir. 1987). In addition, the Minnesota Court of Appeals in *Johnson* v. *O'Brien*, 420 N.W.2d 264 (Minn. App. 1988), *review denied*, No. C9-87-1784 slip op. (Minn. May 18, 1988), *petition for cert. filed sub nom. Dain Bosworth Incorporated* v. *Johnson*, No. 88-246, while recognizing *Wilko*'s "continuing validity" as "questionable" after *McMahon*, 420 N.W.2d at 267, still felt constrained to follow *Wilko*.

Such results as the Minnesota Court of Appeals reluctantly reached in *Johnson* v. *O'Brien* can only lead lower courts to stray from the rule laid down by this Court: that the Arbitration Act is valid except where Congress has expressed its intention, either in statutory language or legislative history, to repeal it. They may also encourage parties to cast ordinary broker-customer disputes in terms of Section 12(2) as a device to escape

arbitration, which would frustrate the substantive rights established by the Arbitration Act.

Amicus respectfully submits that the petition for *certiorari* should be granted in order to prevent chaos among the lower courts that are trying to define the scope and validity of the Arbitration Act.

POINT I

THE UNITED STATES ARBITRATION ACT MANDATES THAT ARBITRATION BE RECOGNIZED AS AN EFFICIENT AND WIDELY ACCEPTED MEANS OF RESOLVING BROKER-CUSTOMER DISPUTES IN THE SECURITIES INDUSTRY

The United States Arbitration Act provides that an agreement to arbitrate in a contract involving interstate commerce is valid to the same extent as any other contract. When Congress passed the Arbitration Act in 1925, it established a clear federal policy favoring the use of arbitration to resolve disputes. That policy marked a decisive shift from the hostility to arbitration then prevalent in the courts.

In its recent decisions, this Court has found occasion to recognize the policy behind the Arbitration Act. In *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, the Court observed:

> [W]e are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.

473 U.S. at 626-27. *Accord Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U.S. at 24 (the Arbitration Act "is a congressional declaration of a liberal federal policy favoring arbitration . . . [and] questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"); *Southland Corp.* v. *Keating*, 465 U.S. at 10 (in passing the Arbitration Act, "Congress declared a national pol-

icy favoring arbitration . . . [that] mandated the enforcement of arbitration agreements''); *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974). *See also Wilko* v. *Swan*, 346 U.S. at 439 (Frankfurter, J., dissenting) (''[t]here is nothing in the record . . . to indicate that the arbitral system . . . would not afford the plaintiff the rights to which he is entitled'').[1]

Since this Court has decisively abandoned both the analytical reasoning and the deep suspicion of arbitration that permeates the opinion in *Wilko* v. *Swan*, there is no reason that *Wilko* should hold sway even in the narrow space to which it is now restricted. *Wilko* is premised on a fundamental hostility to arbitration. *See Shearson/American Express, Inc.* v. *McMahon*, 107 S.Ct. at 2340. Proceeding from that premise, *Wilko* espoused the theory that an agreement to arbitrate Securities Act controversies waives substantive rights under that statute. Because Section 14 of the Securities Act, 15 U.S.C. § 77n, invalidates ''any . . . stipulation . . . to waive compliance with any provision'' of the Securities Act, and because the Court was suspicious that arbitration panels would not adequately enforce complaints with that Act, it therefore found predispute agreements to arbitrate Section 12(2) claims void.[2]

The decision in *Wilko* flatly ignored the substantive federal policy embodied in the Arbitration Act. In equating an agree-

1 The language in *Mitsubishi*, *Moses H. Cone*, and *Southland* echoes Justice Frankfurter's dissenting language in *Wilko*, 346 U.S. at 439, rather than the majority's concern in *Wilko* that arbitration of Section 12(2) claims would endanger the ''special rights'' created thereby, 346 U.S. at 435.

2 *Wilko's* language shows extraordinary cynicism as to the competence of arbitration tribunals:

> [A Securities Act] case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must not only be determined but applied by the arbitrators without judicial instruction on the law. As the award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as ''burden of proof,'' ''reasonable care'' or ''material fact'' . . . cannot be examined.

346 U.S. at 435-36.

ment to arbitrate Securities Act controversies with a waiver of compliance with that Act, *Wilko* put the blind eye to Congress's unmistakable mandate that arbitration was to be a respected method of resolving disputes and that there was no public policy against agreements to arbitrate.

As this Court has recognized, its recent decisions substantially differ from *Wilko's* hostility to arbitration. For example, *McMahon* observed:

> It is difficult to reconcile *Wilko's* mistrust of the arbitral process with this Court's subsequent decisions involving the Arbitration Act.

107 S.Ct. at 2341. Moreover, this Court has twice rejected the predicate of the *Wilko* decision, the notion that an agreement to arbitrate controversies under a federal statute waives compliance with the provisions of that statute:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits their resolution to an arbitral, rather than judicial forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 628; *accord, Shearson/American Express, Inc.* v. *McMahon*, 107 S.Ct. at 2339.

Not only did *McMahon* abandon *Wilko's* reasoning, it reached the exact opposite holding: for it held that an agreement to arbitrate claims arising under Section 10(b) of the Exchange Act was *not* a ''stipulation . . . to waive compliance with'' the Exchange Act, which is void under Section 29(a) of that Act, 15 U.S.C. § 78cc(a), whereas *Wilko* had held that such an agreement *was* a ''stipulation . . . to waive compliance with'' the Securities Act. Yet, although *McMahon* questioned *Wilko's* continuing vitality (''indeed most of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims to be nonarbitrable''), it nonetheless cautioned that ''*stare decisis* concerns may counsel against

upsetting *Wilko's* contrary conclusion under the Securities Act." 107 S.Ct. at 2341.

Wilko's inconsistency with the state of arbitration today in the securities industry not only explains but justifies this Court's reluctance to follow *Wilko's* holding or its policy pronouncements. The established structure of arbitration in the securities industry refutes *Wilko's* assumption that the enforcement of contracts to arbitrate securities disputes will dilute the protection of investors under the securities laws. Securities exchanges and the National Association of Securities Dealers, Inc. (the "N.A.S.D."), under the supervision of the Securities and Exchange Commission, provide arbitration facilities for disputes between member firms and their public customers.[3] The current procedures have evolved since 1872, when the New York Stock Exchange, Inc., first adopted arbitration procedures. The N.A.S.D. has maintained arbitration facilities for more than forty years. The exchanges and the N.A.S.D. also have permanent arbitration staffs. Their rules and constitutions contain detailed codes of arbitration procedures.[4]

Moreover, the Securities and Exchange Commission has approved the implementation and operation of this arbitral system, *see* Exchange Act Release No. 16390, S.E.C. (Nov. 30, 1979), 18 S.E.C. Docket 1197 (1979), and retains jurisdiction to monitor the fairness of arbitration proceedings. *See* Section 19 of the Exchange Act, 15 U.S.C. § 78s. As the Commission itself argued to this Court in *McMahon*, in a brief signed by its General Counsel and Solicitor:

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3 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9542 (Rule 602); N.A.S.D. Manual (CCH) ¶ 3701; 2 N.Y.S.E. Guide (CCH) ¶ 2600 (Rule 600); Uniform Code of Arbitration § 1, *reprinted in* Fifth Report of the Securities Industry Conference on Arbitration (April 1986).

4 *See, e.g.*, Constitution of the New York Stock Exchange, Inc., Art VIII, 2 N.Y.S.E. Guide (CCH) ¶¶ 1351-1357; Rules 600-634 of the New York Stock Exchange, Inc., *id.* ¶¶ 2600-2634; Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., N.A.S.D. Manual (CCH) ¶¶ 3701-3743; Arbitration Rules of the American Stock Exchange, Inc., 2 Am. Stock Ex. Guide (CCH) ¶¶ 9540-9551J.

> [T]he Commission has had the power to ensure that arbitration procedures prescribed by the [Self-Regulatory Organizations] are adequate to enforce the rights of customers against brokerage firms that are members of SROs. In these circumstances, the suspicion of arbitration on which *Wilko* rested is inappropriate, and an agreement to arbitrate acccordingly should not be deemed a waiver of rights under the Exchange Act.

Shearson/American Express, Inc. v. *McMahon*, No. 86-44, Brief of the Securities and Exchange Commission as *amicus curiae* at 13.

The long established competence of securities industry arbitrators to adjudicate disputes should dispel any suspicion of the arbitral process in that industry. The stock exchanges and the N.A.S.D. keep permanent lists of arbitrators. These lists comprise senior securities industry personnel, attorneys, and other professionals from outside the industry, who are well versed in the field. *See, e.g.*, Panel of Arbitrators 1986-1987, 1 Am. Stock Ex. Guide (CCH) ¶¶ 157-59; N.A.S.D. Manual (CCH) ¶ 3702. Most have previously served as arbitrators and are therefore well acquainted with arbitration procedures and customs. Thus, this Court's observation in *Mitsubishi* that "adaptability and access to expertise are hallmarks of arbitration," 473 U.S. at 633, hits the mark with respect to the securities industry. As this Court stated after reviewing the state of arbitration in the securities industry in *McMahon*, "Even if *Wilko*'s assumptions regarding arbitration were valid at the time *Wilko* was decided, most certainly they do not hold true today. . . ." 107 S.Ct. at 2341.[5]

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5 Far from considering themselves as the only tribunal capable of hearing securities disputes, the federal courts have recognized securities industry arbitrators as qualified to resolve those claims. Courts have long compelled arbitration of Exchange Act disputes between members of a securities exchange or the N.A.S.D. *See, e.g.*, *Shearson/American Express, Inc.* v. *McMahon*, 107 S.Ct. 2332; *Axelrod & Co.* v. *Kordich, Victor & Neufeld*, 320 F. Supp. 193 (S.D.N.Y. 1970), *aff'd*, 451 F.2d 838 (2d Cir. 1971); *Brown* v. *Gilligan, Will & Co.*, 287 F. Supp. 766,

The arbitration rules of the N.A.S.D. and the various stock exchanges further ensure that arbitration practice in the securities industry will be efficient and impartial. For example, these rules require that panels of arbitrators include members of the securities industry and of the public.[6] They require a majority of "public" arbitrators (*i.e.*, unaffiliated with member firms) in disputes between public customers and member firms unless the customer requests otherwise.[7] Arbitrators are required to disclose any business affiliation with any parties before them, and may be disqualified for cause for even the appearance of a conflict of interest.[8] Each party in an arbitration has at least one peremptory challenge.[9]

The arbitration itself proceeds much like a trial. The parties have the right to be present at the hearing, to be represented by counsel, to cross-examine witnesses, and to take a transcript of the hearing. They may subpoena witnesses and documents just as in a court proceeding, and may also compel the presence of any employee of a member of the sponsoring institution at a hearing, regardless of whether that employee would be within the subpoena power of the courts of the state where the hearing

772 (S.D.N.Y. 1968). Claims under the Exchange Act are routinely arbitrated if the public customer chooses to arbitrate. *See Gardner* v. *Shearson, Hammill & Co.*, 433 F.2d 367 (5th Cir. 1970) (per curiam), *cert. denied*, 401 U.S. 978 (1971); *Moran* v. *Paine, Webber, Jackson & Curtis*, 389 F.2d 242 (3d Cir. 1968); *cf. AVC Nederland B.V.* v. *Atrium Inv. Partnership*, 740 F.2d 148 (2d Cir. 1984) (affirming the dismissal of an Exchange Act claim because the parties had agreed to try all disputes in the Netherlands).

6 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9541 (Rule 601); N.A.S.D. Manual (CCH) ¶ 3719; 2 N.Y.S.E. Guide (CCH) ¶ 2607 (Rule 607); Uniform Code of Arbitration § 8.

7 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9542 (Rule 602); N.A.S.D. manual (CCH) ¶ 3719; 2 N.Y.S.E. Guide (CCH) ¶ 2607 (Rule 607); Uniform Code of Arbitration § 8.

8 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9542(f) (Rule 602)(f); N.A.S.D. Manual (CCH) ¶ 3723; 2 N.Y.S.E. Guide (CCH) ¶ 2610 (Rule 610); Uniform Code of Arbitration § 11.

9 *See, e.g.*, Uniform Code of Arbitration § 10.

is held.[10] Moreover, arbitrators serve, and witnesses testify, under oath.[11] The fairness of these rules and procedures is borne out by the results of arbitrations conducted under them. In 1987, 55% of public customer cases that went to arbitration before one of the stock exchanges or the N.A.S.D. and were decided—rather than being settled—awarded damages to the customer.[12]

Moreover, the arbitration process significantly reduces discovery expenses and minimizes delay in reaching a hearing. *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 628; C. Katsoris, *The Arbitration of a Public Securities Dispute*, 53 Fordham L. Rev. 279, 286 (1984). For example, state laws generally provide subpoena power to arbitrators and counsel, and parties are encouraged to produce documents "to the fullest extent possible without resort to the issuance of the subpoena process."[13] Arbitrators may also direct the appearance of persons associated with member organizations or the production of records of these organizations without using the subpoena process.[14] That most stock exchanges and the

10 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶¶ 9546, 9548-49, 9551A (Rules 606, 608-09, 612); 2 N.Y.S.E. Guide (CCH) ¶¶ 2614-15, 2619-20, 2624 (Rules 614-15, 619-624); Uniform Code of Arbitration §§ 15-16, 20-21, 25.

11 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9551B (Rule 613); 2 N.Y.S.E. Guide (CCH) ¶ 2625 (Rule 625); Uniform Code of Arbitration § 26.

12 *See* Minutes of the June 24, 1988, Meeting of the Securities Industry Conference on Arbitration, which reported arbitration statistics for 1987 similar to those previously reported to the Securities and Exchange Commission. A table of these statistics, and of the 1986 statistics compiled by the Securities Industry Conference on Arbitration, is set forth in Appendix A.

13 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9548 (Rule 608); N.A.S.D. Manual (CCH) ¶ 3732; 2 N.Y.S.E. Guide (CCH) ¶ 2619 (Rule 619); Uniform Code of Arbitration § 20; C. Katsoris, *supra*, at 286.

14 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9549 (Rule 609); N.A.S.D. Manual (CCH) ¶ 3733; 2 N.Y.S.E. Guide (CCH) ¶ 2620 (Rule 620); Uniform Code of Arbitration § 21.

N.A.S.D. offer a streamlined arbitration procedure for smaller claims also enables customers to resolve small disputes without incurring great expense.[15] Arbitration also offers an expeditious result. According to statistics compiled by the Securities Industry Conference on Arbitration, nearly 4,364 securities industry arbitrations were filed with stock exchanges and the N.A.S.D. in 1987, and 2,936 arbitrations in the securities industry were resolved during that year.[16] The 1987 figures represent more than three times the number of arbitrations filed in 1982.[17]

Finally, the excessive caseload in the federal district courts makes it all the more important that arbitrable claims between securities firms and their customers proceed to arbitration. Filings of securities and commodities claims have increased to 2,844 in 1987.[18] Since the average caseload per United States District Judge in 1987 was 460 cases,[19] permitting agreements to arbitrate all securities laws claims would effectively create up to six new federal district judgeships, which would help to relieve the federal courts of their overloaded dockets.

Wilko thus stands bereft of any factual, legal, or policy support. *Amici* respectfully submit that *Wilko*'s defiance of congressional policy, its analytical inconsistency with this Court's more recent decisions, and its invalid factual assumptions take it out of the shelter of *stare decisis*. As the Court has long recog-

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15 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9551H (Rule 619); N.A.S.D. Manual (CCH) ¶ 3710; 2 N.Y.S.E. Guide (CCH) ¶ 2601 (Rule 601); Uniform Code of Arbitration § 2.

16 *See* Appendix A.

17 The number of filings rose from 1,340 in 1982 to 4,364 in 1987. *See* Fifth Report of the Securities Industry Conference on Arbitration Statistical Report (April 1986) (Exhibit A), which is reproduced in Appendix B to this Brief.

18 Annual Report of the Director of the Administrative Office of the United States Courts, Table C2 (1987). This table is reproduced in excerpted form as Appendix C to this Brief. These figures are calculated on the basis of a year beginning July 1; "1987" statistics therefore refer to the period July 1, 1986, through June 30, 1987.

19 Administrative Office of the United States Courts, Federal Court Management Statistics 1987 at 167.

nized, "*stare decisis*, in statutory construction, is a useful rule, not an inexorable command." *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring). Thus, the Court has overturned its own precedent in order to achieve consistency in interpreting statutory provisions. *See Commissioner* v. *Estate of Church*, 335 U.S. 632 (1949). The Court in *Church* reconsidered the construction of the "possession or enjoyment" clause under Section 811(c) of the Internal Revenue Code it had adopted in *May* v. *Heiner*, 281 U.S. 238 (1930). It did so because its subsequent decision in *Helvering* v. *Hallock*, 309 U.S. 106 (1940), had construed the same "possession or enjoyment" clause in Section 811(c) of the Code differently from *May*. *Church* found that the decision in *Hallock* amounted to a complete rejection of the rationale in *May*, even though it did not expressly overrule *May*. *Commissioner* v. *Estate of Church*, 335 U.S. at 643-45. While acknowledging the interests inherent in the doctrine of *stare decisis*, the Court overruled *May* in order to bring an inconsistent holding in line with its later decision. *See Commissioner* v. *Estate of Church*, 335 U.S. at 649-50. As stated in *Helvering v. Hallock*, where the Court was also confronted with incompatible decisions, the "real problem . . . is to determine whether we are to adhere to a harmonizing principle . . . or whether we are to multiply gossamer distinctions between the present cases and the . . . earlier ones." 309 U.S. at 118. Here, too, a holding that Section 12(2) claims are arbitrable would make the law with respect to those claims consistent with the law regarding Exchange Act claims.

Likewise, the Court has not hesitated to overrule decisions that "do not state the correct rule of law." *See Girouard* v. *United States*, 328 U.S. 61, 69 (1946) (overruling *United States* v. *Schwimmer*, 279 U.S. 644 (1929), *United States* v. *MacIntosh*, 283 U.S. 605 (1931), and *United States* v. *Bland*, 283 U.S. 636 (1931)). Here, again, where *Wilko*'s legal reasoning and policy consideration cannot pass muster under this Court's more recent Arbitration Act decisions, *Wilko* cannot "state the correct rule of law" and should therefore be overruled.

Last, should the Court overrule *Wilko*, it will bestow the additional policy advantage of making the law uniform for all securities law claims. Parties will have no incentive to continue to plead a Section 12(2) claim as a means of avoiding arbitration. The federal court system will therefore be spared substantial motion practice over pleading matters, as well as over difficult collateral estoppel issues that invariably arise when claims arising under the same set of facts must be resolved by different tribunals.

POINT II

WILKO V. *SWAN* IGNORED THE STANDARD FOR FINDING AN IMPLIED REPEAL OF THE UNITED STATES ARBITRATION ACT

By holding that Section 12(2) claims are not arbitrable on the basis of its own perception of arbitration practice, *Wilko* usurped Congress's role in setting federal policy. Specifically, while purporting to resolve a conflict between "two policies, not easily reconcilable", 346 U.S. at 438, *Wilko* in fact manufactured that conflict on the basis of its hostility to arbitration. Notwithstanding Congress's policy favoring arbitration, *Wilko* equated an agreement to arbitrate Securities Act claims with a waiver of compliance with the Securities Act in order to void such an agreement under Section 14.

Wilko's analysis stands at odds with many of this Court's rulings, in particular *McMahon* and *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc. Mitsubishi* requires that any finding of an implied repeal of the Arbitration Act be supported by "congressional intention expressed in some other statute . . . ." 473 U.S. at 627. This is simply a reiteration of the traditional standard for finding that a federal statute has been repealed by implication by a subsequently enacted federal statute. *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. at 88 (" 'repeals by implication [of a prior statute by a subsequently enacted one] are disfavored' ") (quoting *Allen* v. *McCurry*, 449 U.S. 90, 99 (1980)); *Morton* v. *Mancari*, 417 U.S. at 550 ("In the

absence of some affirmative showing of an intention [by Congress] to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable").

In *Mitsubishi*, this Court stated:

> We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.

473 U.S. at 628.[20]

Under this test, there can be no question that predispute agreements to arbitrate Section 12(2) claims are enforceable under the Arbitration Act. The Securities Act contains no statutory language that restricts a party's ability to choose an arbitral forum with respect to claims brought thereunder. Section 14, on which *Wilko* relied, concerns waivers of compliance with the Securities Act, not agreements as to what forum a claim under the Securities Act may be tried before. This Court has already marked this distinction in *Mitsubishi* and *McMahon* to the extent of holding that Section 29 of the Exchange Act, a nonwaiver provision substantially identical to Section 14, did not void agreements to arbitrate in *McMahon*.

Nor is there any evidence in the legislative history of the Securities Act that Congress intended to repeal the Arbitration Act with respect to Securities Act claims. That Congress in amending the securities laws in 1975 did not act to overrule *Wilko* has no bearing on what Congress intended in 1933, the critical inquiry at bar. Nor does the fact that the Conference Report for those amendments observed that they were not intended to disturb existing law as to waiver of claims and cited *Wilko* v. *Swan*. *See* H.R. Conf. Rep. No. 94-229, at 111 (1975),

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20 The opinion in *Mitsubishi* cited *Wilko* v. *Swan* for this proposition, in spite of the fact that *Wilko* did not rely on text or legislative history, but rather on its hostile view of arbitration practice and its conception of an agreement to arbitrate statutory claims as a waiver of compliance with the statute in question, both of which notions *Mitsubishi* rejected in no uncertain terms.

reprinted in 1975 U.S. Code Cong. & Ad. News, at 179, 342. The Court in *McMahon* found the language quoted from that Conference Report so obscure as not to be probative of anything, with the result that "the *Wilko* issue was left to the courts." 107 S.Ct. at 2343. Moreover, such subsequent legislative inaction will not prevent a Court from revisiting a decision that was ill-founded, as *amici* respectfully suggest is the case here. For example, in *Girouard* v. *United States*, the Court overruled its prior interpretation of a statute after Congress had rejected amendments to that statute that would have overruled the prior interpretation. *See* 328 U.S. at 72-76 (Stone, C. J., dissenting). As the majority held, "it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law. We do not think under the circumstances of this legislative history that we can properly place on the shoulders of Congress the burden of the Court's own error." 328 U.S. at 69-70.

Absent specific legislative evidence to the contrary, the Arbitration Act must apply to Securities Act claims and agreements to arbitrate those claims must be honored as ordinary contracts.

POINT III

THE CIRCUITS STAND IN CONFLICT AS TO THE ARBITRABILITY OF SECURITIES ACT CLAIMS

A direct conflict now exists among the Circuits with respect to whether a predispute agreement to arbitrate claims arising under the Securities Act is enforceable. The decision below directly conflicts with the decision of the Second Circuit in *Chang* v. *Lin*, 824 F.2d 219, 222 (2d Cir. 1987), albeit in *dictum*, that *Wilko* is still valid because it was not expressly overruled in *McMahon*.[21] In addition, in a case where a petition for

21 In addition to this case, the Tenth Circuit has recognized in *dictum* that "*McMahon* . . . essentially overruled *Wilko* . . . ." *Peterson* v. *Shearson/American Express, Inc.*, 849 F.2d 464, 466 (10th Cir.). A split also exists among the district courts which have considered the issue. At least five reported decisions have held that *McMahon* effectively overruled *Wilko*, thus allowing for the arbitration of claims under the Securities Act: *Ryan* v. *Liss, Tenner & Goldberg*, 683 F. Supp. 480 (D.N.J. 1988); *Kavouras* v. *Visual Products Systems, Inc.*, 680 F. Supp. 205 (W.D. Pa. 1988); *Aronson* v. *Dean Witter Reynolds, Inc.*, 675 F. Supp. 1324 (S.D. Fla. 1987); *Staiman* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 673 F. Supp. 1009 (C.D. Cal. 1987); *Jeppsen* v. *Piper, Jaffray & Hopwood, Inc.*, [Current] Fed. Sec. L. Rep. ¶ 93, 996 (D. Utah August 16, 1988). Seven other courts have refused to overrule *Wilko*. *See Abadian* v. *Drexel Burnham Lambert*, No. 88-0186 (E.D. Pa. August 4, 1988) (LEXIS, Genfed library, Dist file); *Araim* v. *PaineWebber, Inc.*, No. 1:88-CV-73-JOF (N.D. Ga. June 21, 1988) (LEXIS, Genfed library, Dist file); *McCullogh* v. *Shearson Lehman Brothers, Inc.*, No. 86-2752 (W.D. Pa. February 18, 1988) (LEXIS, Genfed library, Dist file); *Ketchum* v. *Almahurst Bloodstock IV*, 685 F. Supp. 786 (D. Kan. 1988); *McCowan* v. *Dean Witter Reynolds, Inc.*, 682 F. Supp. 741 (S.D.N.Y. 1987); *Schultz* v. *Robinson-Humphrey/American Express, Inc.*, 666 F. Supp. 219 (M.D. Ga. 1987); *Continental Service Life & Health Ins. Co.* v. *A.G. Edwards & Sons, Inc.*, 664 F. Supp. 997 (M.D. La. 1987).

a writ of *certiorari* is now pending before this Court, the Court of Appeals of Minnesota, while recognizing that *Wilko*'s "continuing validity" is "questionable" in light of *McMahon*'s unequivocal rejection of its analytical and policy bases, still felt constrained to follow *Wilko*'s *result* until this Court affirmatively overrules *Wilko*. *Johnson* v. *O'Brien*, 420 N.W.2d 264 (Minn. App. 1988), *review denied*, No. C9-97-1784 slip op. (Minn. 1988), *petition for cert. filed sub nom. Dain Bosworth Incorporated* v. *Johnson*, No. 88-246.

CONCLUSION

For the reasons set forth above, *amicus curiae* the Securities Industry Association, respectfully requests that the petition for a writ of *certiorari* be granted.

Dated: October 20, 1988

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SECURITIES INDUSTRY ASSOCIATION

APPENDIX A

1987—ARBITRATION STATISTICS FOR SELF-REGULATORY ORGANIZATIONS AS COMPILED BY THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION

	Total Cases Received	Total Cases Concluded Including Settlements	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards In Favor Of Public	Cases Carried Into 1988
American Stock Exchange, Inc.	123	72	36	26	38	24	48
Boston Stock Exchange, Inc.	0	0	0	0	0	0	0
Chicago Board Options Exchange	130	93	29	33	22	9	53
Cincinnati Stock Exchange, Inc.	0	0	0	0	0	0	0
Midwest Stock Exchange, Inc.	5	3	1	1	1	1	2

1986—ARBITRATION STATISTICS FOR SELF-REGULATORY ORGANIZATIONS AS COMPILED BY THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION

	Total Cases Received	Total Cases Concluded Including Settlements	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards In Favor Of Public	Pending
American Stock Exchange, Inc.	63	40	18	17	31	14	24
Boston Stock Exchange, Inc.	2	2	2	2	2	0	0
Chicago Board Options Exchange	72	44	16	9	12	9	28
Cincinnati Stock Exchange, Inc.	0	0	0	0	0	0	0
Midwest Stock Exchange, Inc.	4	0	1	0	0	0	6

A2

1987—ARBITRATION STATISTICS FOR SELF-REGULATORY ORGANIZATIONS AS COMPILED BY THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION

	Total Cases Received	Total Cases Concluded Including Settlements	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards In Favor Of Public	Cases Carried Into 1988
Municipal Securities Rule-Making Board	106	91	38	34	42	24	69
National Association of Securities Dealers, Inc.	2,886	1,625	458	325	642	364	*
New York Stock Exchange, Inc.	1,050	1,000	225	204	378	200	842
Pacific Stock Exchange, Inc.	64	52	27	11	23	13	64
Philadelphia Stock Exchange, Inc.	*	*	*	*	*	*	*
Total	4,364	2,936	814	634	1,146	635	1,078

A3

* Figure Unavailable.

1986—ARBITRATION STATISTICS FOR SELF-REGULATORY ORGANIZATIONS AS COMPILED BY THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION

	Total Cases Received	Total Cases Concluded Including Settlements	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards In Favor Of Public	Pending
Municipal Securities Rule-Making Board	82	68	28	20	39	15	61
National Association of Securities Dealers, Inc.	1,587	1,199	390	327	476	248	1,840
New York Stock Exchange, Inc.	965	1,004	181	205	432	210	792
Pacific Stock Exchange, Inc.	41	37	9	13	18	8	58
Philadelphia Stock Exchange, Inc.	22	15	10	6	7	2	2
Total	2,838	2,409	655	599	1,017	506	2,830

A4

APPENDIX B

Fifth Report of the Securities Industry Conference on Arbitration Statistical Report (April 1986) (Exhibit A)

COMPOSITE ARBITRATION FIGURES

	Total Cases Received	Total Cases Concluded, Including Settlements	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	830	686	332	269	410	205
1981	1,042	980	306	357	532	264
1982	1,340	1,044	322	292	558	293
1983	1,731	1,259	416	320	622	331
1984	2,449	1,762	561	489	736	366
1985	2,796	2,190	664	520	961	530

A5

AMERICAN STOCK EXCHANGE, INC.

	Total Cases Received	Total Cases Concluded, Including Settlements	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	45	41	18	11	35	16
1981	39	40	7	11	42	22
1982	37	31	9	4	16	10
1983	41	42	14	8	10	6
1984	69	53	16	14	45	26
1985	64	58	21	14	41	24

Cases carried over into 1986: 29

A6

BOSTON STOCK EXCHANGE, INC.

	Total Cases Received	Total Cases Concluded, Including Settlements	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	2	2	2	2	2	0
1981	2	2	2	2	0	0
1982	1	1	1	1	1	1
1983	2	2	2	2	2	1
1984	0	0	0	0	0	0
1985	0	0	0	0	0	0

Cases carried over into 1986: 0

A7

CHICAGO BOARD OPTIONS EXCHANGE, INC.

	Total Cases Received	Total Cases Concluded, Including Settlements	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	44	31	11	11	18	6
1981	41	32	8	8	12	3
1982	50	38	6	6	14	3
1983	75	45	5	4	13	6
1984	91	56	24	16	4	3
1985	64	38	10	5	0	0

Cases carried over into 1986: 26

A8

CINCINNATI STOCK EXCHANGE, INC.

	Total Cases Received	Total Cases Concluded, Including Settlements	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	0	0	0	0	0	0
1982	0	0	0	0	0	0
1983	0	0	0	0	0	0
1984	0	0	0	0	0	0
1985	0	0	0	0	0	0

Cases carried over into 1986: 0

A9

MIDWEST STOCK EXCHANGE, INC.

	Total Cases Received	Total Cases Concluded, Including Settlements	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	2	2	1	0	1	1
1981	2	2	0	0	0	0
1982	1	0	0	0	0	0
1983	2	2	0	0	0	0
1984	1	0	0	0	0	0
1985	1	0	0	0	0	0

Cases carried over into 1986: 2

A10

MUNICIPAL SECURITIES RULEMAKING BOARD

	Total Cases Received	Total Cases Concluded, Including Settlements	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	21	21	7	7	3	2
1981	25	25	5	5	7	4
1982	33	30	7	7	13	6
1983	78	39	17	9	14	5
1984	113	77	20	17	34	21
1985	91	112	31	35	54	31

Cases carried over into 1986: 60

A11

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

	Total Cases Received	Total Cases Concluded, Including Settlements	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	318	234	134	113	122	56
1981	422	422	142	177	242	118
1982	606	435	157	139	276	140
1983	768	549	216	147	272	161
1984	1,108	747	298	244	381	196
1985	1,400	962	377	250	434	232

Cases carried over into 1986: 1,452

A12

NEW YORK STOCK EXCHANGE, INC.

	Total Cases Received	Total Cases Concluded, Including Settlements	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	367	327	131	110	221	119
1981	477	433	117	134	214	111
1982	558	473	109	113	214	118
1983	713	532	136	122	276	137
1984	1,008	796	176	183	259	113
1985	1,095	962	198	190	424	221

Cases carried over into 1986: 831

A13

PACIFIC STOCK EXCHANGE, INC.

	Total Cases Received	Total Cases Concluded, Including Settlements	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	24	28	12	11	4	3
1981	24	20	17	17	9	5
1982	31	21	15	11	10	7
1983	35	29	17	17	23	10
1984	45	26	21	11	10	7
1985	50	40	12	18	20	12

Cases carried over into 1986: 54

A14

PHILADELPHIA STOCK EXCHANGE, INC.

	Total Cases Received	Total Cases Concluded, Including Settlements	Small Claims Received	Small Claims Concluded	Public Customer Cases Decided	Awards in Favor of Public
1980	7	0	16	4	4	2
1981	10	6	6	3	6	1
1982	23	15	18	11	14	8
1983	17	19	9	11	12	5
1984	14	7	6	4	3	0
1985	31	18	15	8	8	2

Cases carried over into 1986: 14

A15

APPENDIX C

EXCERPTS FROM TABLE C 2.—U.S. DISTRICT COURTS CIVIL CASES COMMENCED, BY BASIS OF JURISDICTION AND NATURE OF SUIT DURING THE TWELVE MONTH PERIODS ENDED JUNE 30, 1986 AND 1987

Nature of Suit	1986	1987					
		Total	U.S. Cases		Private Cases		
			Plaintiff	Defendant	Federal Question	Diversity of Citizenship	Local Jurisdiction
Total Cases	254,838	238,982	42,653	29,369	99,301	67,071	588
Contract Actions	88,352	69,540	28,749	868	6,988	32,840	95
Real Property Actions	10,674	11,585	5,836	904	733	4,072	40
Tort Actions, Total	42,326	42,947	190	3,145	9,180	30,098	334
Personal Injury	38,248	39,146	88	2,867	8,101	27,769	321
Personal Property Damage	4,078	3,801	102	278	1,079	2,329	13
Actions Under Statutes, Total	113,392	114,836	7,876	24,449	82,383	59	69
Antitrust	877	785	21	6	758	-	-
Bankruptcy	4,561	4,701	97	67	4,537	-	-
Banks and Banking	518	520	120	77	323	-	-

EXCERPTS FROM TABLE C 2.—U.S. DISTRICT COURTS CIVIL CASES COMMENCED, BY BASIS OF JURISDICTION AND NATURE OF SUIT DURING THE TWELVE MONTH PERIODS ENDED JUNE 30, 1986 AND 1987—(Cont'd)

Nature of Suit	1986	1987					
		Total	U.S. Cases		Private Cases		
			Plaintiff	Defendant	Federal Question	Diversity of Citizenship	Local Jurisdiction
Civil Rights	20,128	19,785	668	1,775	17,342	-	-
Commerce (ICC Rates, Etc.)	922	1,063	67	7	989	-	-
Economic Stabilization Act	12	17	1	6	10	-	-
Environmental Matters	641	702	291	139	270	2	-
Deportation	199	172	-	155	17	-	-
Prisoner Petitions	33,765	37,316	12	4,507	32,779	-	18
Forfeiture and Penalty	3,480	3,493	3,345	148	-	-	-
Labor Laws	12,839	12,746	1,093	185	11,468	-	-
Protected Property Rights	5,681	5,514	20	17	5,477	-	-
Securities, Commodities, and Exchanges	3,059	3,020	165	11	2,844	-	-
Social Security Laws	14,407	13,322	81	13,241	-	-	-

EXCERPTS FROM TABLE C 2.—U.S. DISTRICT COURTS
CIVIL CASES COMMENCED, BY BASIS OF JURISDICTION AND NATURE OF SUIT
DURING THE TWELVE MONTH PERIODS ENDED JUNE 30, 1986 AND 1987—(Cont'd)

Nature of Suit	1986	1987					
			U.S. Cases		Private Cases		
		Total	Plaintiff	Defendant	Federal Question	Diversity of Citizenship	Local Jurisdiction
State Reapportionment Suits	10	3	–	–	3	–	–
Tax Suits	2,750	2,784	913	1,823	–	–	48
Customer Challenge	57	40	–	40	–	–	–
Freedom of Information Act	505	444	–	405	39	–	–
Constitutionality of State Statutes	336	318	5	8	302	–	3
Other Statutory Actions	8,645	8,091	977	1,832	5,225	57	–
Other Actions, Total	84	74	2	3	17	2	50
Domestic Relations	6	4	–	–	–	–	4
Insanity	–	–	–	–	–	–	–
Probate	–	–	–	–	–	–	–
Other	78	70	2	3	17	2	46